IN THE

# United States Circuit Court of Appeals,

## FOR THE NINTH CIRCUIT.

Pan American Petroleum Company, a corporation,

*Libelant and Appellant,*

*vs.*

Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,

*Respondent,*

Star and Crescent Boat Company,

*Claimant and Appellee.*

## BRIEF FOR APPELLANT.

H. F. PRINCE,

GIBSON, DUNN & CRUTCHER,

634 South Spring St., Los Angeles, California,

*Proctors for Libelant and Appellant.*

Parker, Stone & Baird Co., Law Printers, Los Angeles.

## TOPICAL INDEX.

PAGE

Statement of Case ... 4

Nature of the Action ... 4

Defenses in the Answer ... 4

Statement of Essential Facts ... 4

The Findings ... 7

Assignments of Error Relied Upon ... 8

Grounds of the Decision Below ... 9

Brief of the Argument ... 9

Argument ... 10

I.

It conclusively appears from the record on appeal that claimant was, several months prior to the transaction by which it received bill of sale from Mr. Heston, the mortgagor, to respondent vessel and cancelled and surrendered the mortgage thereon, fully advised of the existence of respondent's claim, and if it did not have actual notice thereof was charged with constructive notice ... 10

II.

Where a mortgagee, with knowledge of an outstanding junior lien, intentionally cancels his mortgage and accepts a conveyance from the mortgagor of the mortgaged property, the prior mortgage is merged in the conveyance and no longer takes priority over the junior lien, and this is true even though the conveyance was taken under a misapprehension as to the status of the outstanding lien or claim ... 14

PAGE

III.

The mere fact that by the provisions of respondent's mortgage the owner agreed not to suffer or permit any lien to be incurred against the vessel, did not prevent libelant from obtaining a lien against the vessel subsequent to the lien of respondent ........ 30

(A) The fact that claimant's mortgage in this case had the status of a preferred mortgage is immaterial........ 35

(B) Cases involving limitations of the authority of charterers, purchasers on conditional sale or persons other than the owners of vessels are not in point........ 36

(C) The provision of the mortgage in this case purporting to forbid the owner incurring any lien whatever is invalid as a clog on the equity of redemption........ 36

Conclusion ........ 38

# TABLE OF CASES AND AUTHORITIES CITED.

PAGE

Bailey v. Eakes, 271 S. W. 978, 979 .......... 10, 16, 17

Beacham v. Gurney, 60 N. W. 187, 188 .......... 10, 20, 21

Benenson v. Evans, 134 S. E. 441, 444 .......... 10, 28

Coder v. McPherson, 152 Fed. 951, 953 .......... 9, 13

Emmons v. Crooks, 1 Grant's Chancery, 159, 167-168 .......... 10, 25, 26

Errett v. Wheeler, 123 N. W. 414, 416, 417 .......... 10, 22, 25

Frazee v. Inslee, 2 N. J. Eq. 239, 242 .......... 10, 28, 29

Gainey v. Anderson, 68 S. E. 888, 890 .......... 10, 14, 16

Mellon v. St. Louis Union Trust Co., 225 Fed. 693, 703 .......... 9, 13

Morse Drydock & Repair Co., Petitioner, v. S. S. "Northern Star," *et al.,* 271 U. S. 552; 70 L. Ed. 1082, 1083 .......... 10, 30, 34, 36

The Northern Star, 7 Fed. (2d) 505 (C. C. A. 2) .. 10, 33

The Northern Star, 295 Fed. 366, 370 .......... 31, 32

The Tompkins, 13 Fed. (2) 552, 554 .......... 9, 13

Toulmin v. Steere, 36 Eng. Rep. 81; 3 Merivale 211 .......... 10, 26, 28

Woodside v. Lippold, 39 S. E. 400, 401-402; 84 Am. St. Rep. 267 .......... 10, 17, 20

2 Pomeroy Equity Jurisprudence, Sec. 597 .......... 9, 13

3 Pomeroy Equity Jurisprudence, Secs. 1193, 1194, p. 2826, Note 1 .......... 10, 37

20 Ruling Case Law, p. 346, Sec. 7 .......... 9, 13

No. ......

IN THE

# United States
# Circuit Court of Appeals,

## FOR THE NINTH CIRCUIT.

---

Pan American Petroleum Company, a corporation,

*Libelant and Appellant,*

*vs.*

Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,

*Respondent,*

Star and Crescent Boat Company,

*Claimant and Appellee.*

---

## BRIEF FOR APPELLANT.

This is an appeal from the District Court of the United States, for the Southern District of California, Southern Division, after trial in admiralty before Honorable Paul J. McCormick, District Judge. The opinion of the court appears at page 51 of the record and is printed in Volume 50, Federal Reporter, 2nd Series, page 447.

The Pan American Petroleum Company was libelant in the court below and the Star & Crescent Boat Company was the claimant, and for convenience they will be so designated herein.

## STATEMENT OF CASE.

### Nature of the Action.

This was a libel *in rem* [R. p. 2] brought by libelant against the Oil Screw "Bergen" for the recovery of the value of fuel oil and supplies furnished by libelant to the said vessel at the request of John E. Heston, who was then the managing owner and agent of said vessel.

### Defenses in the Answer.

The answer of the claimant [R. p. 14] denied the allegations of the libel for lack of information and belief and sets up as special defenses the allegation [R. p. 15] that said John E. Heston, by the terms of a preferred mortgage executed by him covering the said vessel, was unauthorized to grant, incur or permit any lien for supplies or materials on said vessel. It was further alleged [R. p. 19] that the supplies furnished to the "Bergen" were furnished to it as a carrier or tender and not for its use, but for the use of other vessels.

### Statement of Essential Facts.

The case was tried upon a stipulation of facts [R. p. 76] and upon oral testimony, as provided by paragraphs XII and XIII of said stipulation of facts [R. p. 45] on the issue of notice to claimant of the fact that libelant had furnished supplies to the vessel. This stipulation of facts, briefly, provided that libelant had furnished and supplied to the vessel fuel oil and gasoline and other fuel supplies of the total value of $2,062.31 upon written order signed by John E. Heston, who was then the owner and managing agent of the vessel. A typical purchase order is

set out at page 37 of the record and contains the notations, "Deliver to M. S. Bergen" and "Charge to M. S. Bergen"; signed "John E. Heston". It was stipulated [R. p. 39] that all of the said materials and supplies were delivered to respondent vessel in the harbor of San Pedro and that a delivery ticket accompanied each delivery and was signed in each case either by the captain or by the chief engineer of the respondent vessel.

A typical invoice covering supplies so delivered is set up at page 39 of the record, containing the notation "sold to the boat 'Bergen' and owners, John E. Heston Account #1".

It was further stipulated [R. p. 40] that of the materials and supplies so delivered to respondent vessel, there was actually used by said vessel gasoline, deisel fuel and lubricating oil of the reasonable and agreed value of $1287.61, and that no part of said sum had been paid to libelant and the whole thereof, together with interest thereon at 7% per annum from October 26, 1928, remains due and owing.

It was stipulated [R. p. 41] that prior to the time when the said supplies were furnished to the said vessel, the claimant sold the said vessel to said John E. Heston and as a part of the consideration therefor said John E. Heston executed his promissory note in the principal amount of $40,000, secured by a preferred mortgage, dated September 30, 1927, and that all things required to be done by the Merchants' Marine Act of June 5, 1920, in order to give the mortgage the status of a preferred mortgage were duly performed.

It was stipulated [R. p. 43] that a copy of the mortgage was retained on board the respondent vessel by the

mortgagor who had, upon request of any person having business with the vessel, exhibited its documents. It was also stipulated that "libelant did not at any time mentioned in the stipulation of the facts have any actual knowledge of the execution or delivery of said preferred mortgage or of the existence of the same". [R. pp. 43-44.] It was stipulated [R. p. 44] that during February, 1929, claimant requested Mr. Heston, who for three months had been in default in payments under the terms of the mortgage, to execute and deliver to claimant a bill of sale of the respondent vessel and to deliver possession of the said vessel to claimant; that after some negotiations it was agreed that Heston would execute and deliver the bill of sale provided claimant would accept the same in full payment of the indebtedness of the said Heston and would cause the mortgage to be fully satisfied, cancelled and discharged and deliver up to said Heston his said note in the sum of $40,000; and this arrangement was consummated on or about the 1st day of May, 1929.

The foregoing facts appear without contradiction from the stipulation of facts on which the case was submitted. The oral testimony introduced at the trial relative to the question of notice to claimant of the existence of claimant's lien against the respondent vessel, presents some contradictory features. Heston's testimony was quite clear that he had repeatedly told Captain Hall, an officer of the claimant, of the libelant's account against the respondent vessel [R. pp. 60-64] and that he had made similar statements to a Mr. Chandler, another officer of the claimant company. Captain Hall's testimony contradicted that of Mr. Heston to some extent, although for the most part it is entirely uncontradicted.

## The Findings.

Libelant requested the court to make a finding that during the course of conversations had between John E. Heston and the claimant, prior to the execution and delivery of the bill of sale from Heston to claimant,

> "said claimant was advised by the said John E. Heston of the fact that libelant herein had furnished materials and supplies, consisting of gasoline, fuel oil and petroleum products, for use of the respondent vessel, that a substantial portion of the purchase price of said materials so furnished and used by said respondent vessel had not been paid, and that the said Heston anticipated that libelant would take action against respondent vessel, but that no action had at that time been instituted." [R. pp. 48-49.]

The foregoing request for findings was denied, except as incorporated in findings as made by the court, which appear at page 55 of the record, where the court finds merely that

> "It is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein, or what *specific* materials and supplies were furnished to respondent vessel; nor is it true that claimant was advised that said Heston anticipated that libelant would take action against respondent vessel."

It will be noted that there was no contention on the part of libelant that claimant had been advised as to "what specific materials and supplies" were furnished.

## ASSIGNMENTS OF ERROR RELIED UPON.

Libelant relies upon the following assignments of error:

(a) Assignments 1, 2, 5, 6, 7 and 8 [R. pp. 74-76]: The court erred in finding that claimant was not advised by Mr. Heston of the existence of libelant's claim and that Mr. Heston anticipated libelant would take action against the libelant vessel.

(b) Assignments 3 and 5 [R. p. 75]: The court erred in failing and refusing to make, as requested by libelant, a finding that claimant was advised by Mr. Heston of the fact that libelant had furnished fuel supplies and materials for the use of the respondent vessel and that a substantial portion of this indebtedness remained unpaid, and that Mr. Heston anticipated that libelant would take action against the respondent vessel.

(c) Assignments 4 and 7 [R. pp. 75-76]: The court erred in failing to find upon the issues of fact arising on the trial of said action pursuant to paragraphs 12 and 13 of the stipulation of facts, and in omitting to find whether claimant was advised by Mr. Heston during the times referred to in said paragraph 12 of the approximate amount and character of the claim of libelant herein, or what materials and supplies were furnished to respondent vessel, or that libelant had not at that time instituted any action.

(d) Assignment 7 [R. p. 76]: The evidence is wholly insufficient to justify the finding of the trial court that it is not true that during the negotiations referred to therein claimant was advised by Mr. Heston as to what specific materials and supplies were furnished to respondent vessel.

(e) Assignment 9 [R. p. 76]: The court erred in its conclusions of law in finding that libelant acquired no lien against the respondent vessel.

## Grounds of the Decision Below.

It is apparent from the opinion of the District Court that the decision of the court was reached solely on the question of the effect of the clause in the claimant's mortgage by which the mortgagor was forbidden to incur any liens against the vessel, with certain defined exceptions, and this was the point mainly relied upon by the claimant at the trial. The question of the effect of the cancellation of the mortgage with knowledge of the outstanding claim of the libelant, is not passed upon by the trial judge.

## BRIEF OF THE ARGUMENT.

I.

**It conclusively appears from the record on appeal that claimant was, several months prior to the transaction by which it received bill of sale from Mr. Heston, the mortgagor, to respondent vessel and cancelled and surrendered the mortgage thereon, fully advised of the existence of respondent's claim, and if it did not have actual notice thereof was charged with constructive notice.** [R. pp. 60-69.]

*The Tompkins,* 13 Fed. (2) 552, 554 (C. C. A. 2);
*Mellon v. St. Louis Union Trust Co.,* 225 Fed. 693, 703 (C. C. A. 8);
*Coder v. McPherson,* 152 Fed. 951, 953 (C. C. A. 8);
2 *Pomeroy Equity Jurisprudence,* Sec. 597;
20 *R. C. L.,* p. 346, Sec. 7.

II.

Where a mortgagee, with knowledge of an outstanding junior lien, intentionally cancels his mortgage and accepts a conveyance from the mortgagor of the mortgaged property, the prior mortgage is merged in the conveyance and no longer takes priority over the junior lien, and this is true even though the conveyance was taken under a misapprehension as to the status of the outstanding lien or claim.

*Gainey v. Anderson* (Ga.), 68 S. E. 888, 890;

*Bailey v. Eakes* (Ark.), 271 S. W. 978, 979;

*Woodside v. Lippold* (Ga.), 39 S. E. 400, 401-402; 84 Am. St. Rep. 267;

*Beacham v. Gurney* (Ia.), 60 N. W. 187, 188;

*Errett v. Wheeler* (Minn.), 123 N. W. 414, 416, 417;

*Benenson v. Evans* (Ga.), 134 S. E. 441, 444;

*Frazee v. Inslee,* 2 N. J. Eq. 239, 242;

*Emmons v. Crooks,* 1 Grant's Chancery 159, 167-168;

*Toulmin v. Steere,* 36 Eng. Rep. 81; 3 Merivale 211.

III.

The mere fact that by the provisions of respondent's mortgage the owner agreed not to suffer or permit any lien to be incurred against the vessel, did not prevent libelant from obtaining a lien against the vessel subsequent to the lien of respondent.

*Morse Drydock & Repair Co., Petitioner, v. S. S. "Northern Star", et al.,* 271 U. S. 552; 70 L. ed. 1082, 1083;

Same case, 7 Fed. (2d) 505 (C. C. A. 2);

3 *Pomeroy Equity Jurisprudence,* Secs. 1193, 1194, p. 2826, Note 1.

## ARGUMENT.

### I.

### It Conclusively Appears From the Record on Appeal That Claimant Was, Several Months Prior to the Transaction by Which It Received Bill of Sale From Mr. Heston, the Mortgagor, to Respondent Vessel and Cancelled and Surrendered the Mortgage Thereon, Fully Advised of the Existence of Respondent's Claim, and if It Did Not Have Actual Notice Thereof Was Charged With Constructive Notice. [R. pp. 60-69.]

Mr. Heston's testimony [R. pp. 62-64] was that in the summer or fall of 1928 Captain Hall, an officer of the claimant, solicited Heston's oil business and was told by Heston at that time that he was indebted to Pan American in a large amount, and for that reason could not give him the business, and that all his boats had accounts with the libelant; that the matter was again discussed in January, 1929, at which time Captain Hall requested that a cargo of oil be brought on board the respondent vessel to San Diego, at which time Heston told him that there were large accounts out against all his boats and that they would be jumped on by the libelant; that in a later conversation in February, 1929, he told Captain Hall that some of the Pan American indebtedness was incurred by the "Bergen"; that in the latter part of February he told Ralph Chandler, another officer of the claimant, that he was largely indebted to libelant and that this indebtedness was incurred by all his boats, including the respondent vessel. He repeated this testimony in more detail on cross-examination. [R. pp. 62-63.] He further stated that he told Captain Hall in January 1929, that the "Bergen" was responsible for some of his indebtedness and that he told him of the account against the "Bergen"

which is involved in the present suit. He further testified that at the time of the recording of the satisfaction of mortgage he told the broker, Mr. Wickersham, who was representing both parties, that there were plenty of bills out against the boat, but that no liens had been filed yet, meaning that no suits had been filed. [R. p. 64.]

Captain Hall, called on behalf of the claimant, did not directly deny Mr. Heston's testimony. He did not recall the dates of the conversations but remembered that in the conversation with regard to his company's furnishing Heston fuel, Heston had said that he was deeply indebted to libelant and for that reason could not give claimant his business. He did not remember anything being said about any claim of the libelant against the "Bergen". [R. p. 66.] He stated that Mr. Ralph Chandler, an officer of the claimant, had handled the matter for the claimant in San Pedro in connection with the satisfaction of the mortgage. [R. p. 67.] He also testified that his attention was first called to the various conversations which he had had with Mr. Heston about two weeks prior to the trial (which occurred in February, 1931); that he was not clear as to just what was said in any particular conversation and that he did not know whether Heston's indebtedness that he spoke to him about in the fall of 1928 was confined to any particular boats or not. [R. p. 69.] Neither Mr. Chandler nor Mr. Wickersham testified at the trial, so that Mr. Heston's testimony with reference to his statements to them was entirely uncontradicted.

From the foregoing it appears that claimant, according to the testimony of its own witness, was fully advised of the existence of the indebtedness of Heston to libelant and that on the witness' own admission this indebtedness was not regarded as confined to boats other than the

"Bergen". In view of the haziness of Captain Hall's testimony and his failure to deny the direct and unequivocal testimony of Mr. Heston as to the various conversations, as well as claimant's failure to call Mr. Chandler or Mr. Wickersham, the conclusion is irresistible that claimant did, prior to the time it took back its bill of sale from Heston and discharged the mortgage, have actual knowledge of the existence of a claim on the part of libelant for fuel supplies furnished to respondent vessel.

The evasive nature of the trial court's findings is a recognition of this fact, and explains the insertion of the word "specific" in finding II, before the words "materials and supplies". Of course, it is immaterial whether the claimant had knowledge of the *"specific"* materials and supplies furnished, so long as claimant was *advised that supplies and materials were furnished.*

> "If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary thoughtfulness and care to make further accessible inquiries, and he avoids the inquiry, he is chargeable with the knowledge which by ordinary diligence he would have acquired. Knowledge of facts, which, to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed."

*The Tompkins,* 13 Fed. (2) 552, 554.

*Mellon v. St. Louis Union Trust Co.,* 225 Fed. 693, 703 (C. C. A. 8);

*Coder v. McPherson,* 152 Fed. 951, 953 (C. C. A. 8);

2 *Pomeroy Equity Jurisprudence,* Sec. 597;

20 *R. C. L.,* p. 346, Sec. 7.

Admittedly, the claimant had actual knowledge of Heston's indebtedness to Pan American and that this indebtedness arose from the sale of petroleum supplies used on his various vessels, including the respondent vessel. Nothing further was required to charge the claimant with knowledge of the indebtedness involved in the present suit and the lien which arose therefrom. We do not believe that claimant's counsel will make any contention to the effect that any further knowledge as to the amount, character or nature of the materials or what specific materials were furnished was required or that such information could not have been ascertained upon the slightest inquiry.

## II.

**Where a Mortgagee, With Knowledge of an Outstanding Junior Lien, Intentionally Cancels His Mortgage and Accepts a Conveyance From the Mortgagor of the Mortgaged Property, the Prior Mortgage Is Merged in the Conveyance and No Longer Takes Priority Over the Junior Lien, and This Is True Even Though the Conveyance Was Taken Under a Misapprehension as to the Status of the Outstanding Lien or Claim.**

The foregoing principle is well established, both in this country and in England.

*Gainey v. Anderson* (Ga.), 68 S. E. 888, 890,

was an action by Mrs. Gainey to recover her dower interest in certain land which had been mortgaged by her husband to defendant's assignors. A judgment for the plaintiff was affirmed. The evidence showed that the plaintiff, at the time of the execution of the mortgage, had renounced

her dower in the land, but upon a subsequent conveyance of the land to the mortgagee in satisfaction of the mortgage she did not renounce dower. It was the plaintiff's contention that the merger of the two estates in the mortgagee restored plaintiff's inchoate right of dower. The defense was based upon the contention that it being in the interests of the mortgagees to preserve the lien of their mortgage to protect the legal title against plaintiff's claim of dower, a merger would not take place. The court said, in answer to the contention of defendants and appellants:

> "It does not even appear that the bond and mortgage were retained by the mortgagees. They were put in evidence, but the record fails to show by whom they were introduced, or from whose possession they came. The fact that Mrs. Gainey was asked to sign the deed with her husband tends to support the theory of merger, because *it tends to show that the mortgagees thought that her signature to the deed was sufficient to convey all her interest in the land, including her inchoate right of dower. If they so thought, there would have been no reason to want to keep the mortgage alive.* If she had regularly renounced her dower on the deed, no reason could have been assigned for an intention on the part of the mortgagees to keep the mortgage open. Moreover, it does not appear that Carrigan's interest in the land was conveyed subject to the mortgage, or that the conveyance was accompanied by an assignment of his interest in the mortgage, either of which would have been some evidence of intention to keep the mortgage alive, and the absence of which, of course, tends to prove the contrary. As there is no direct or circumstantial evidence of such intention, the only thing upon which a finding of its existence can be predicated is the presumption which arises from the fact that it would

have been to the interest of the mortgagees, which is overthrown by the facts and circumstances above mentioned.' (Italics ours.)

*Gainey v. Anderson,* 68 S. E. 888, 890.

*Bailey v. Eakes* (Ark.), 271 S. W. 978, 979,

was an appeal by the plaintiff from a decree dismissing his amended bill for failure to state a cause of action against the defendants. The suit was originally brought to foreclose a mortgage, naming the mortgagors as defendants, together with the defendant Eakes, who was made a party by reason of possessing a leasehold interest in the property. During the pendency of the action the mortgagors conveyed the property to plaintiff, and plaintiff accepted the deed with knowledge of the existence of Eakes' leasehold interest. After acceptance of the deed from the mortgagors, the action was dismissed as to the mortgagors and an amended bill was filed against Eakes, the lessee. It was appellant's contention on appeal that after execution and recordation of the mortgage the mortgagors had no right to execute a lease or create a tenancy which would affect the interest of the mortgagee and prevent his foreclosing on the property. In answer to this contention the court said:

"This contention is made upon the erroneous assumption that appellant was a mortgagee after he accepted deeds to the lands from the Martins and Wards. After the execution and acceptance of the deeds, appellant's rights as a mortgagee merged into his estate as owner in fee of the lands, *subject, of course, to other intervening incumbrances of which he had knowledge.* One of the intervening incumbrances was the lease executed by Martin to Dow

Eakes for the year 1924 for $350 cash in advance. Appellant's amended bill contains the following admission:

'It is admitted that before the proceedings to foreclose said mortgage were instituted, the defendant Dow Eakes leased said premises from W. J. Martin for the year 1924, and paid him $350 cash, all of which was known to appellant at the time he accepted the deed in the settlement of his demand.'

"In accepting the deed with knowledge of the tenancy, appellant ceased to be a mortgagee and assumed the relationship of landlord to Dow Eakes and wife. He voluntarily stepped into the shoes of Martin, and his right is no greater than Martin's right." (Italics ours.)

*Bailey v. Eakes,* 271 S. W. 978, 979.

*Woodside v. Lippold* (Ga.), 39 S. E. 400, 401-402; 84 Am. St. Rep. 267,

was an action to establish the priority of plaintiff's mortgages, to have their cancellation declared of no effect, and for foreclosure. It appeared that the mortgagee and his grantee had made an entry of satisfaction upon the mortgage and had the same cancelled of record at a time when both the mortgagee and his grantee, the banking company, had actual notice of a subsequent mortgage but were acting under a misapprehension that the holder of the subsequent mortgage would not insist upon its enforcement. There was evidence that the mortgagee and his grantee would not have cancelled the mortgages but for the fact that they believed there would be no effort to set up the subsequent mortgage. Upon the subsequent mortgagor filing a petition to foreclose his mortgage the present

action was filed. Judgment entered upon a verdict for defendants was affirmed, the court saying:

> "This case turns upon the question whether, under the facts stated, equity will restore the liens of the mortgages canceled by the American Trust & Banking Company to their original priority over the mortgage held by Lippold. Under the view we take of the matter, it is unnecessary to determine whether, according to the equitable doctrine relating to merger, the liens of the mortgages held by the banking company were merged in the title when Mrs. Venable conveyed the premises to the company, or were extinguished by the settlement of the mortgage debt in that transaction; for, in our opinion, there can be no doubt that the liens of such mortgages were absolutely extinguished when, at the request of Woodside, who had purchased the mortgaged property from the banking company, and taken a warranty deed thereto, the banking company made the entries of full satisfaction upon such mortgages, and had them canceled of record; this being done in order to clear the record of liens against the property. If, up to the date of Woodside's purchase, there had been no merger, and the banking company's mortgages were then alive, and if the banking company and Woodside intended when he purchased that he should take all the interests and rights which the banking company held in and to the property, and if, under such circumstances, no merger or extinguishment of the banking company's mortgages occurred, in equity, when Woodside acquired the title, yet when the banking company subsequently, and at his instance and request, deliberately marked the mortgages satisfied, and had them canceled of record, they never having been assigned to Woodside, there was then manifested *an express and unequivocal intention on the part of both*

*Woodside and the banking company that the liens of its mortgages should no longer exist,*—that they should merge in the title which Woodside acquired,—and such intention became effective, and the mortgages were extinguished. It has been uniformly held, in the application of the equitable doctrine concerning merger, that the intention, when expressed, of the person in whom the two estates or interests meet, must control. * * * 'It cannot be doubted that the law will look to the intention of the parties, and the interest of the plaintiff, in order to determine whether the mortgage is to be regarded as paid and canceled. The fact that it was canceled of record will not avail to discharge the mortgage if the parties intended that the lien should continue, and the plaintiff's interests demanded it. But if the parties intended to discharge the mortgage, and the debt was in fact paid, and not transferred to the plaintiff, the cancellation must stand, and the lien be regarded as discharged. The mere fact that plaintiff's interests would have been better protected by permitting the lien to stand will not control against the intention, clearly established. The law will permit a party in such a case, as in others, to act and contract in a manner which would not result to his interest.' See Campbell v. Carter, 14 Ill. 286. The satisfaction and cancellation of the banking company's mortgages seem to have been made under a mistake of fact, that Lippold had abandoned his mortgage and would make no effort to foreclose it. While equity will grant relief against a mistake of fact, it is well settled that such a mistake must be of such a nature that it could not by reasonable diligence, have been avoided at the time. Equity will not relieve against the results of culpable and inexcusable negligence. By the exercise of the slightest diligence on the part of Woodside and

the banking company, they could have readily ascertained the intention of Lippold in reference to the enforcement of his mortgage. It does not appear that he or his attorney ever intimated that the mortgage had been abandoned. The attorney for the banking company gave as a reason for the satisfaction and cancellation of the company's mortgages that the attorney for Woodside reported that he had had an interview with the attorney for Lippold, and that Lippold would not enforce his mortgage. Equity will not grant relief under such circumstances. The verdict being demanded by the undisputed facts, there was no error in refusing to grant a new trial." (Italics ours.)

*Woodside v. Lippold,* 39 S. E. 400, 401-402; 84 Am. St. Rep. 267.

*Beacham v. Gurney* (Ia.), 60 N. W. 187, 188,

was an action to foreclose two mortgages on real estate. The defendants, Waterman and others, in their answer and cross-bill set up judgments in their favor, and asked that they be established as first liens against the property, alleging that plaintiff's mortgage lien had been lost by reason of his having taken title to the land under an agreement to discharge and release the mortgage debt. Decree was entered against the plaintiff and in favor of the cross-complainants, and was affirmed on appeal, the court saying that the evidence showed

"that it was agreed that said deed was in full of all claims against Gurney, including the mortgages in suit, which were to be satisfied, and the notes and mortgages delivered to Gurney; that this deed from Gurney and wife was given and accepted in payment of Gurney's notes and mortgages to the Lombard Company, and which were then held by Beacham;

that Firman, in paying for this land, dealt only with the Lombard Company; that the transaction by Jones in behalf of Lombard and of the Lombard Company was intended as a satisfaction and cancellation of the mortgages; that at the time said deed was taken by Jones, it was *with full knowledge of the judgments of the cross-petitioners.*"

And concluded:

"From these and other facts it is clear that, in taking the deed to the land, it was the intention to cancel and discharge the debt.

"It is contended that the mortgages should be kept alive for the benefit of plaintiffs. Authorities need not be cited to sustain the doctrine that a mortgagee may take a conveyance of the mortgaged premises, and still, as against creditors of the mortgagor, keep his lien alive, as superior to their claims. In such a case, in the absence of evidence to the contrary, the presumption often obtains that it was the intention of the parties to keep alive the mortgage lien, and especially is this the case where such a result is manifestly for the interest of the mortgagee. But this rule does not obtain when it is clear that the intention was to satisfy the debt as to all parties. Weidner v. Thompson, 69 Iowa 37, 28 N. W. 422. Here all the facts show that there was no intention to keep alive the mortgage. On the contrary the debt was paid, and the parties intended that the lien of the mortgages should be discharged. It matters not what moved them to so act as to have the transaction operate as a payment and satisfaction of the debt. They ought not to complain if their acts are given the force and effect which it is clear they intended that they should have." (Italics ours.)

*Beacham v. Gurney,* 60 N. W. 187, 188.

In *Errett v. Wheeler* (Minn.), 123 N. W. 414, 416, 417, plaintiff was the holder of a deed prior in time to defendant's, but defendant's, second in time, was first recorded. In an action to determine adverse claims to the property the court found (1st) that defendant had notice of the prior deed at the time he obtained his title and (2nd) that whether or not he had such notice at the time he acquired his title, he did have notice at a subsequent date when he satisfied his mortgage on the property, and was not entitled to judgment reinstating the satisfied mortgage. In affirming the judgment the court said:

> "* * * But where the mortgagee, or other holder of the mortgage, voluntarily discharges the same, he pays no money to a third person to whose rights he ought in equity to be substituted, and the principles of the law of subrogation do not apply. The grounds usually made the basis of relief from satisfied mortgages, judgments, or other liens upon real property are fraud or mistake—mistake of fact, or, perhaps, mistake of both law and fact, and in exceptional cases mistake of law. The authorities are collected and commented upon in a note to Attkisson v. Building Ass'n, 58 L. R. A. 788. And although a case might arise where a mortgagee would be compelled before payment to satisfy a mortgage still owned and controlled by him, in order to protect other rights in the property, and thus give rise to the right of cancellation in equity under the analogous doctrine of subrogation, it is clear that such is not this case. There can be no claim here that the mortgage in question, which had been assigned to defendant and was then wholly under his control, was satisfied by him to protect any right or interest in the property which was jeopardized by its presence on the record.

"We therefore pass to the question whether any other recognized ground for the relief sought, fraud or mistake, is shown by the record. No fraud is claimed, and it is clear that relief cannot be granted on that ground. The satisfaction was the voluntary act of defendant, without inducement or suggestion from plaintiff. Nor do we find any substantial reason for disturbing the conclusion of the trial court that there was no mistake of fact. Defendant was the owner of the mortgage, and, under the findings, satisfied it of record with knowledge of plaintiff's deed. He was informed of that deed at the time of its execution, three years before the transaction in question, and again two days before he satisfied the mortgage. He was, with respect to this property, an adversary of plaintiff, who was under no obligation to pay the mortgage, and in the face of her claim of title to the property discharged it, not to protect any interest of his likely otherwise to be prejudiced, or because of any fraud or unfair dealings on the part of plaintiff, but to perfect a title claimed by him to be adverse and superior to that held by plaintiff. Clearly, under such circumstances, he is not entitled to relief. Wadsworth v. Blake, 43 Minn. 509, 45 N. W. 1131; Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; Faurot v. Neff, 32 Ohio St. 44; Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788, and cases there cited.

"Nor is defendant entitled to relief on the theory that he mistook his legal rights, or did not understand the legal effect of the cancellation of his mortgage. Mistake of law, unattended by any misunderstanding of the facts, presents, as a general rule, no ground for the interposition of equity. * * *

"Ignorance of the law was held, in Garwood v. Eldridge's Adm'rs & Heirs, 2 N. J. Eq. 145, 34 Am.

Dec. 195, no ground for equitable relief. It appeared in that case that plaintiff purchased certain land which was incumbered by two mortgages. With the consent of the vendors he applied the purchase price of the land in payment of the mortgages and procured their discharge of record. Subsequent to the execution of the mortgages, but before plaintiff obtained his deed for the property, a third person obtained a judgment against the mortgagor, which was a lien upon the land. After the satisfaction of the mortgages, the judgment creditor proceeded to enforce his judgment, and plaintiff brought the action for a reinstatement of the mortgages on the ground of mistake of both law and fact. The court held that relief could not be granted on the ground of mistake of law, and that there was no mistake of fact; for plaintiff could have ascertained the existence of the intervening judgment by consulting the record. The case at bar is much stronger; for here defendant had actual notice of plaintiff's deed. In the case of Talbot v. Garretson, 31 Or. 256, 49 Pac. 978, it was held that, before a court of equity can interfere and restore the lien of a mortgage canceled by mistake, it must appear that at the time of such cancellation the mortgagee did not know of the intervening lien over which he desired to obtain priority by the decree prayed for. In the course of the opinion in that case the court said: 'This is so elementary that its mere statement is sufficient. Manifestly a mortgagee, who, with complete knowledge of the existence of another lien on the mortgaged premises, deliberately cancels and releases his security, cannot subsequently ask a court of equity to restore him to his original priority.'

* * * * * * * *

"Defendant erroneously assumed that his title was superior to plaintiff's because his deed was first re-

corded; and from this error, one solely of law, no equitable relief can be granted on the facts disclosed."

*Errett v. Wheeler,* 123 N. W. 414, 416, 417.

The rule is the same in the English courts.

In *Emmons v. Crooks,* 1 Grant's Chancery 159, 167-168, a third mortgagee, who took his mortgage without notice of a second mortgage or annuity, but thereafter obtained an assignment in his favor of the first mortgage after he had notice of the second mortgage or annuity, and then took a conveyance from the mortgagor, was held to have merged his incumbrances so that the second mortgage or annuity was the only subsisting incumbrance on the property, the court saying:

"Whether reason and the authorities do not establish that the burden of proof should rest in the one class upon the party asserting a merger, and in the other upon the party denying it, we do not now decide, because we are not about to determine anything inconsistent with the case in appeal. On the contrary, the present case falls clearly within the authority of Street v. The Commercial Bank. Here both Shaw and the defendant had clear notice of the plaintiff's incumbrance, before entering into the contracts under which they acquired the inheritance. We are not aware of any decided case opposed to the conclusion at which we have arrived. * * *

"But the circumstances of this case, as detailed in the pleadings, leave, we think, no room for controversy. Here Shaw, with a full knowledge of the plaintiff's annuity, petitions for a sale of the estate, in order to pay off his incumbrances; and the defendant sets up, in his answer, that upon the sale made under that petition Shaw did acquire the inheritance,

free from all incumbrance. Now, whether we regard this transaction as payment of those charges, which cannot now be set up again under Toulmin v. Steere, or as an acquisition of the inheritance, as in Parry v. Wright, we cannot doubt that the parties have manifested a clear intention to merge these charges, and that it is therefore impossible for the court to give effect to the deeds in question, contrary to that intention."

*Emmons v. Crooks,* 1 Grant's Chancery 159, 167-168.

*Toulmin v. Steere,* 36 Eng. Rep. 81; 3 Merivale 211.

In this case the holder of an annuity charged against certain real estate brought an action to enforce the charge against purchasers of the property. The property in question formerly belonged to a Mr. Witts. Plaintiff purchased from him an annuity of £180 secured by this estate, but subject to a mortgage to a Mr. Harrison for £5,000. Subsequently, a mortgage for £3,000 was given to a Mr. Wilby. There was no evidence to show whether or not he had notice of the annuity and thereafter defendants took a conveyance of the property. Mr. Wilby having paid off Harrison and taken an assignment of the mortgage, joined in the conveyance to the defendants. The court held that the plaintiff was entitled to have his charge considered as a first lien against the estate and was not required to redeem encumbrances which at one time had been prior to the annuity. Decision was in plaintiff's favor on the issue, first, of whether the purchaser had bought the property with notice of the plaintiff's charge and, second, as to whether the defendants might require the charge to be paid off only after the prior liens of

which they must be considered as the owners, but which had been discharged. The court said, with reference to this second issue:

> "If the annuity is to be considered as an incumbrance on this estate in the hands of the present owners, the next consideration is, in what order it is to be paid. The charges that preceded it have ceased to exist. They are all paid off and extinguished. The plaintiff contends, that the annuity is now to be considered as the sole charge affecting the estate. The defendants say, it is only to be paid in the order in which it originally stood, and that the purchasers must be considered as the owners of the antecedent charges, and entitled to retain, in the first place, so much as would be sufficient to keep down the interest of them. Supposing Mr. Witts himself had paid off all the other incumbrances, the annuitant would have stood in the same situation as if she had been from the beginning the sole incumbrancer. He could not have said 'I will retain for myself so much of the rents and profits as would have been required to keep down the interest of the other charges, and you must take your chance of there being enough left to pay you your annuity.' In effect Witts has paid off the other incumbrances; for they have been paid out of the purchase money, and he has received so much less for his estate than he otherwise would have done. Then, what equity can the purchasers have, to consider them as still subsisting as against any person claiming under Witts? They are in no worse situation than they would have been if they had bought an estate on which there was no mortgage, but which turned out to be encumbered with an annuity, not known to them in fact, but constructively known to them by means of notice to their agent. In that case, would they be permitted to say, there was a time

when there was a charge upon the estate prior to the annuity, and therefore, as between the annuitant and us, that charge shall be considered as still existing? The cases of Greswold v. Marsham (2 Cha. Ca. 170), and Mocatta v. Murgatroyd (1 P. Wms. 393), are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

*Toulmin v. Steere,* 36 Eng. Rep. 81, 86; 3 Merivale 211.

The rule is the same in cases where a purchaser of property who has discharged an incumbrance seeks to be subrogated to the lien of the incumbrance as against the holders of other incumbrances of which he had notice.

*Benenson v. Evans* (Ga.), 134 S. E. 441, 444:

"Unquestionably a purchaser of property who has discharged an incumbrance thereon at the request of the debtor will be subrogated to the lien of such incumbrance as against the holders of other incumbrances of which he had no notice, *but not as against the holders of other incumbrances of which he had notice, either actual or constructive.*" (Italics ours.)

*Benenson v. Evans* 134 S. E. 441, 444.

*Frazee v. Inslee,* 2 N. J. Eq. 239, 242.

This was a suit to foreclose a mortgage which, while prior in time, was not placed on record until after defendant's mortgage. After complainant's mortgage had been recorded defendant canceled his mortgage of record and took a deed from the mortgagor for the property. In his answer defendant alleged he was a *bona fide* purchaser

without notice and entitled to hold the premises by virtue of his deed or that his mortgage should be revived as against the plaintiff. In rendering a decree for the plaintiff the court said:

> "In the absence of any proof of fraud by the complainant, or his agent, when the mortgage was canceled intentionally and understandingly by the defendant, and a deed taken for the same property, I cannot upon any safe principle revive the mortgage, or prevent the complainant from reaping the benefit of his rights as a first mortgagee. This would be giving encouragement to negligence, and destroy the value of a public record. It is to be observed, that the defendant has no certificate from the clerk of any search, but the evidence is, that the clerk's deputy told him, upon enquiry, that there were only certain incumbrances on the property, omitting that of the complainant. It further appears, from the testimony of Jeremiah Crocheron, that before taking the deed he mentioned to the defendant, Campbell, the existence of this mortgage—that he got his information from Inslee; to which Campbell said, he would run the risk of that, for he had searched. This information, coming directly from Inslee, should, at any rate, have put him on enquiry and more diligent investigation."
>
> *Frazee v. Inslee,* 2 N. J. Eq. 239, 242.

It follows from the foregoing cases that if, at the time claimant satisfied and discharged its mortgage and delivered up the note representing the indebtedness secured thereby, it had actual or constructive knowledge of the facts giving rise to libelant's lien, then the lien of claimant's mortgage ceased to exist and no longer takes priority over libelant's lien.

## III.

## The Mere Fact That by the Provisions of Respondent's Mortgage the Owner Agreed Not to Suffer or Permit Any Lien to Be Incurred Against the Vessel, Did Not Prevent Libelant From Obtaining a Lien Against the Vessel Subsequent to the Lien of Respondent.

In the opinion of counsel for appellant, the case of *Morse Drydock & Repair Co., Petitioner, v. S. S. "Northern Star"*, 271 U. S. 552; 70 L. ed. 1082. is conclusive of this issue. The attitude toward this decision taken by the trial judge is, we submit, totally without precedent in American jurisprudence. The necessary ground of that decision, which is apparent from the opinion of the Supreme Court itself, as well as from that of the Circuit Court of Appeals and of the District Court (as we shall later show), was the existence of a lien on the part of the repair man. Yet the trial judge, in the opinion herein, denominates that portion of the decision discussing the existence of a lien in favor of the repair man as "dicta" and not controlling. Although the decision was concurred in by seven other justices, the opinion below refers to a dissenting opinion of Justice McReynolds as indicating that the Supreme Court was not unanimous "as to the ineffectiveness of the clear language of the Ship Mortgage Act to defeat liens such as that claimed by the libelants herein". In fact the entire opinion below is nothing more than an elaboration of the dissenting opinion of Justice McReynolds in the "Northern Star" case, an opinion which was rejected by all the other justices of that court.

The opinion of the Circuit Court of Appeals in the "Northern Star" case is reported in 7 Fed. (2d) 505, and the opinion of the District Court in 295 Fed. 366. The

libelant sought to establish a lien for repairs. Intervenor Luber set up a purchase money mortgage executed by the owner to the United States Government, which had been assigned to Luber. Both the District Court and the Circuit Court of Appeals decided in favor of the mortgagee, the District Court holding that under the terms of the mortgage by which the mortgagor was precluded from suffering or permitting any lien that might have priority over the mortgage, claimant never acquired any lien against the vessel and the owner had no power to bind the vessel. The District Court said:

> "Under the law as quoted, I am of the opinion that Mr. Garmey had no authority to bind the vessel, nor did the American Star Line, Inc., through whom his authority, if he had any, must have come, have any authority itself to bind the vessel, because of the prohibition contained in said mortgage, *even if the said mortgage were not a preferred mortgage.*"

*The Northern Star,* 295 Fed. 366, 369.

We are calling the court's attention particularly to this portion of the decision, as we anticipate that claimant will make some attempt to distinguish the "Northern Star" case on the ground that the mortgage there was finally held not to be a preferred mortgage. We think it is obvious, as stated by the trial judge in the "Northern Star" case, that the effectiveness of the prohibition contained in the mortgage does not depend on whether the mortgage is a preferred mortgage.

Referring to the limitation of the owner's authority in the mortgage, the District Court said:

> "Holding, therefore, as I do, that by the terms of said mortgage the American Star Line, Inc. was prohibited from creating a maritime lien for the repairs

made by the libelant, and that such prohibition comes under the term 'for any other reason,' as set forth in said subsection R, there can be no doubt that, had libelant exercised reasonable diligence, it could have ascertained the fact, because inquiry at the office of the American Star Line, Inc., the records of the collector's office in the custom house, both in New York City, of Mr. Garmey, or of the captain or officer in charge of the ship, would have furnished libelant with complete information."

*The Northern Star,* 295 Fed. 366, 370.

The court further held that the intervenor's mortgage was a preferred mortgage and that the provision requiring that the mortgage be endorsed on the ship's papers was directory and not merely mandatory.

The Circuit Court of Appeals said, at page 505:

"The questions presented to us are (1) whether the appellant has a maritime lien because of the work, labor, and services performed in repairs to the vessel; and (2) whether the appellee (Luber's) preferred mortgage has a preferred status from August 11, 1920, the date of its recordation in the custom house at the Port of New York; and (3) whether it takes priority over the appellant's claim, assuming that the appellant has a lien."

And at page 506:

"It will be observed from the foregoing provision of the mortgage that the owner covenanted not to permit a prior lien to the mortgage. The conveyance of the vessel to the American Star Line, Inc., was absolute, and, when the appellant finished its work pursuant to its employment by an authorized agent, it had a lien on the vessel pursuant to the terms of

the Ship Mortgage Act of 1920 (subdivisions P, Q. R [Comp. St. Ann. Supp. 1923, Secs. 8146¼ooo-4146¼pp]), but whether it ranks ahead of the mortgage of Luber depends upon whether that mortgage is a preferred mortgage under the provisions of the Ship Mortgage Act. If that mortgage may not be deemed a preferred mortgage, then the appellant's lien is senior in rank."

*The Northern Star,* 7 Fed. (2) 505, 506.

The Supreme Court, 271 U. S. 552, held that the repair man obtained a lien despite the prohibition contained in the mortgage and further held that this lien took precedence over the mortgage which, due to the failure of the Collector of Customs to make the necessary endorsement on the ship's papers, was not a preferred mortgage under the statute. The express holding of this case is that the limitation of the owner's authority to bind the vessel contained in the mortgage is absolutely ineffective, for, by the terms of that clause, the owner was prohibited from incurring a lien which might become prior to the mortgage, *which was exactly what the Supreme Court permitted him to do.* The necessary effect of the holding in the "Northern Star" case is that *any* clause in a mortgage purporting to limit the authority of the mortgagor to incur liens is ineffective to prevent the attaching of a lien. If the provision in that case did not prevent the mortgagor from incurring a lien "which has or might have priority" over the mortgage, the provision in the mortgage in this case did not prevent the incurring of a lien inferior to claimant's mortgage. We are not, of course, contending that the lien of libelant was at any time, prior to discharge of claimant's mortgage, superior to it. In the opinion of the Supreme Court, it is stated:

> "The repairs were made between November 14 and November 27, 1920, at the owner's request. One of the covenants of the mortgage was not to suffer or permit to be continued any lien that might have priority over the mortgage, and in any event within fifteen days after the same became due to satisfy it. Another covenant, probably shaped before the then recent Ship Mortgage Act, 1920, June 5, 1920, chap. 250, Sec. 30, 41, Stat. at L. 988, 1000, Comp. Stat. Sec. 8146¼jjj, Fed. Stat. Anno. Supp. 1920, p. 251, required the mortgagor to carry a certified copy of the mortgage with the ship's papers, and to take other appropriate steps to give notice that the owner had no right to permit to be imposed on the vessel any lien superior to the mortgage. On these facts we feel no doubt that the petitioner got a lien upon the ship, as was assumed by the Circuit Court of Appeals. Ship Mortgage Act, subsection P, 41 Stat. at L. 1005.
>
> The owner of course had 'authority to bind the vessel' by virtue of his title without the aid of statute. The only importance of the statute was to get rid of the necessity for a special contract or for evidence that credit was given to the vessel."
>
> *Morse Dry Dock & Repair Company, Petitioner, v. Steamship Northern Star,* 271 U. S. 552.

If, as stated in the opinion of the Supreme Court, the owner's "authority to bind the vessel" exists without the aid of statute, then that authority is not affected by the provision of a statute requiring the supply man to use reasonable diligence to ascertain whether, by reason of certain agreements, the person ordering the supplies had no authority to bind the vessel. Subsection R does not take away or purport to take away any authority not granted by the preceding subsection Q of the statute.

### (A) The Fact That Claimant's Mortgage in This Case Had the Status of a Preferred Mortgage Is Immaterial.

As we have already seen, the trial judge in the Northern Star case specifically stated that the limitation on the power of the owner to bind the vessel was equally effective whether the mortgage was preferred or not. The circumstance that in the present case the mortgage is conceded to be preferred is immatrial, for the reason (a) that it is not necessary for libelant herein to establish that its lien was at any time prior to the lien of the preferred mortgage that has been discharged; and (b) the fact that the mortgage was a preferred mortgage in this case did not charge the libelant with any greater degree of diligence to ascertain its terms than if the mortgage had not been preferred or the prohibition had been contained in any other duly recorded provision coming within the provisions of subsection R of the Act. The only difference between the "Northern Star" case and the present case is that in the "Northern Star" case the repair man sought to obtain preference over the mortgage, while in this case the sole question is whether the libelant obtained a lien. This question, however, was equally involved in the "Northern Star" case and this was recognized by all three courts passing on that case in reaching their decisions. Libelant in the "Northern Star" case had to establish not only that he had obtained a lien, but that the mortgage was not a preferred one, while in the present case all the libelant has to establish is that a lien was obtained.

### (B) Cases Involving Limitations of the Authority of Charterers, Purchasers on Conditional Sale or Persons Other Than the Owners of Vessels Are Not in Point.

Claimant's counsel cited to the trial court, and the trial court apparently relied somewhat upon a number of cases in which under the provision of subsection R of the Ship Mortgage Act a charterer or purchaser under contract of conditional sale has been held to be without authority to bind the vessel, by reason of a limitation contained in the agreement, charter party or conditional sale from the owner. Obviously, such cases, which do not involve a prohibition contained in an agreement *executed by the owner* of a vessel, have no bearing on any issue in the present case, which involves only the question of the right of the owner to bind the vessel owned by him, regardless of the terms of a mortgage which he may have executed. The owner has such authority without the aid of statute. (Northern Star case, 271 U. S. 552.) A charterer or person other than the owner does not have such authority without the aid of statute. Consequently, to such latter party subsection R of the Ship Mortgage Act applies, but it does not apply to the case of an agreement executed by the owner.

### (C) The Provision of the Mortgage in This Case Purporting to Forbid the Owner Incurring Any Lien Whatever Is Invalid as a Clog on the Equity of Redemption.

The limitation of the owner's authority contained in the "Northern Star" case was not necessarily a clog on the equity of redemption, inasmuch as it only purported to forbid the owner from incurring a lien which might be-

come superior to the mortgage. Such clause might be justified, but the clause in the present case is not in anywise justifiable. The holder of a preferred mortgage does not require the protection of such a clause. It affords him no additional security. No lien can attach which is superior to his mortgage, and his mortgage, until discharged by him, will necessarily prevail against all liens except certain special liens specified in the Ship Mortgage Act. It follows that the provision in the claimant's mortgage, so far as it attempts to limit the exercise of the equity of redemption, by precluding persons furnishing supplies and other necessaries from exercising this right of redemption, is invalid as a clog on the equity of redemption. As stated in 3 Pomeroy Equity Jurisprudence, page 2826, Sec. 1193, Note 1,

> "The doctrine is universal in its application, it underlies many special rules of equity. It extends to stipulations limiting the time of redemption, *or the parties who may redeem.*"

The necessary effect of the provision in question and the very purpose for which it is invoked in the present case, is to limit the parties who may redeem. There can be no substantial distinction between a clause providing that the mortgagee shall have no power to create liens of a certain character and a clause providing that lienors of a certain character shall have no right of redemption. The only purpose and the only effect either clause can have in a mortgage is to restrict or limit the equity of redemption. No device, whatever its form, will be allowed to have this effect.

## CONCLUSION.

It is respectfully submitted that the foregoing points establish that there was no evidence below which justified the decree entered and that the court erred in refusing to make the findings requested by libelant. The uncontradicted evidence shows that claimant, with knowledge of the circumstances giving rise to libelant's lien, intentionally and deliberately cancelled its mortgage and accepted a conveyance from the mortgagor of the respondent vessel. The decision below cannot be reconciled with the decision of the Supreme Court in the "Northern Star" case, 271 U. S. 552, and in fact constitutes a definite refusal to follow the law as pronounced in that decision. It is submitted that that portion of the opinion of the Supreme Court dealing with the question of whether the libelant in that case obtained a lien is not only not dicta, but is a necessary ground of the decision, and whether dicta or not, correctly states the law, and in the absence of opposing authority (of which there is none) is absolutely controlling in this case.

For each and all of the foregoing reasons, it is earnestly submitted that the decree below should be set aside and that an order be made for the entry of a decree in favor of libelant.

Respectfully submitted,

H. F. Prince,

Gibson, Dunn & Crutcher,

By H. F. Prince,

*Proctors for Libelant and Appellant.*